IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923

McMILLAN CONTRACTING COMPANY AND FIDELITY NATIONAL BANK & TRUST COMPANY OF KANSAS CITY,
Appellants,

v. NO. 167

WALTER L. ABERNATHY AND CARRIE S. ABERNATHY,
Appellees.

Brief on Behalf of Appellants.

JUSTIN D. BOWERSOCK,
SAM'L J. McCULLOCH,
FRANK P. BARKER,
G. V. HEAD,
BOWERSOCK & FIZZELL, *Attorneys for Appellants.*
MILLER, CAMACK, WINGER & REEDER,
of Counsel.

John C. Bovard, Printer, 809 Baltimore Ave., Kansas City, Mo.

SUBJECT INDEX

ALPHABETICAL LIST OF CASES CITED.

LIST OF CASES CITED (Continued)

LIST OF CASES CITED (Continued)

LIST OF CASES CITED (Continued)

LIST OF CASES CITED (Continued)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923

McMILLAN CONTRACTING COMPANY AND FIDELITY NATIONAL BANK & TRUST COMPANY OF KANSAS CITY,
Appellants,

v. NO. 167

WALTER L. ABERNATHY AND CARRIE S. ABERNATHY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief on Behalf of Appellants.

STATEMENT.

This is a suit to cancel and set aside certain tax bills issued by Kansas City, Missouri, and to have complaintants' land adjudged free of any liens on account thereof. The tax bills, purported to be issued under the authority of the

charter of Kansas City and in accordance with the provisions of said charter, and particularly Section 28 of Article VIII thereof, for the grading of Meyer Boulevard in said city.

The bill alleges four distinct grounds for holding the tax bills void: *first,* that Section 28 of Article VIII of the charter of Kansas City, Ordinance No. 21831 (providing for the grading of said boulevard) and all proceedings thereunder are in violation of the Constitution of the United States (Trans. 12); *second,* that the charter and ordinance were not complied with, in that a certain suit required therein to be filed was not filed (Trans. 10); and *third,* that said Section 28 was violated in the issuance of the bills, in that the tax bills were not levied in proportion to the benefits accruing to the several parcels of land (Trans. 14).

The answers denied all these violations. They alleged further that the suit required by the charter and ordinance had been filed and that the judgment therein was *res judicata* of all questions of fact raised by the bill (Trans. 18).

The District Court set the tax bills aside, the decree specifying no particular ground for such action (Trans. 20-21). The opinion filed by the District Judge indicates that he determined the case upon the ground that the benefit district and the assessment were arbitrary and unreasonable. (Trans. 126-133). From this decree, an appeal was duly prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit (Trans. 22-26), and by that court the case was transferred here pursuant to Section 238A of the Judicial Code (Trans. 136).

The portion of Meyer Boulevard graded under these proceedings forms an approach to the entrance of Swope Park, one of the large parks of Kansas City. It connects the park with the boulevard system. As its name implies,

it is a broad avenue or parkway, varying from 220 to 500 feet in width. It has two paved driveways with spaces for flowers and planting both between and outside the driveways. In order to make it an adequate and imposing approach to the great park, it was graded in a substantial plane throughout the portion involved in these proceedings, and for this reason, it was deemed by the city authorities too large an undertaking to be paid for in the usual charter method of assessing the cost of grading, i. e., an assessment against the abutting property only. It was, therefore, determined to assess the cost against a larger benefit district provided for in Section 28 of Article VIII of the Kansas City Charter, hereinafter set out, a section adopted to relieve abutting property in cases of unusually burdensome grading.

For this purpose, the proper authorities established a benefit district extending along both sides of the proposed boulevard for the full length of the portion to be graded and in width from 63rd Street on the north to 67th Street on the south. The boulevard runs a somewhat irregular course, averaging 500 to 600 feet south of the east-and-west center line of this district, which is a broad, open area. North of 63rd Street, the land is platted and considerably occupied with residences, and is served by 63rd Street and other streets northward into the city. South of 65th Street the land slopes rapidly to the south, is platted into small residence lots and is of a character to be served rather by street cars than by automobiles and other vehicles. The benefit district is unplatted and, therefore, better adapted to development as boulevard property. It is some six miles from the business center, is high and sightly and is very desirable for residence purposes.

Prior to letting the contract for the grading, a suit was filed in the Circuit Court of Jackson County by the city against the owners of the respective tracts in the benefit district to determine the validity of the proceedings, the propriety of the benefit district and the inclusion and exclusion of lands therein and therefrom. Service was had by publication against such owners in accordance with the charter provision; a trial was had; the district approved the proceedings and no appeal taken.

In reliance on this judgment, the contract was let, the work done, the benefit assessed and the tax bills issued, all in due and legal manner, unless some one or more of the objections urged thereto by appellee be held to invalidate the bills.

The facts bearing upon each of the contested points will be further referred to in connection with such points respectively.

SPECIFICATION OF ERRORS.

1. The court erred in not finding and holding that the provisions of Section 28 of Article 8 of the Charter of Kansas City, Missouri, had been complied with in the matter of the suit required by that Section to be filed in the Circuit Court of Jackson County, Missouri, and in all other matters required by that Section.

2. The court erred in not finding and holding that the judgment in the suit filed in the Circuit Court of Jackson County, Missouri, under the provisions of said Section 28, was and is *res judicata* as to the propriety and reasonableness of the benefit district fixed by Ordinance Number 21831, as to the method of apportionment and as to all other matters that were or might have been litigated therein.

3. The court erred in ruling that the benefit district was arbitrary and unreasonable.

4. The court erred in ruling that the assessment was arbitrary and unreasonable.

5. The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question.

6. The court erred in holding that the tax bills unreasonably exceeded the benefit, or any possible benefit to the lands in question.

7. The court erred in holding that the improvement in question was in its nature a general public improvement, rather than a local improvement.

8. The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable.

9. The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills.

10. The court erred in making any finding as to the relation between the amount of the tax bills in question and the values of the lands in controversy, for the reason that there was no competent evidence as to such values.

11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy.

12. The court erred in making any finding as to the extent of the special benefits received by the respective tracts for the reason that there was no competent evidence as to such benefits, and erred in admitting any evidence on that issue.

13. The court erred in determining the validity of the tax bills in question upon the relation between the amount of each tax bill and the extent of the special benefit to the respective tract covered by such bill.

POINTS AND AUTHORITIES.

I.

Section 28 of Article VIII of the Kansas City Charter does not violate the Constitution of the United States.

West v. *Burke*, 286 Mo., 358, 228 S. W., 775;
Nichols v. *Kansas City*, 291 Mo., 690, 237 S. W., 107;
Embree v. *Kansas City and Liberty Boulevard Road District*, 240 U. S. 242, 36 S. Ct. 317, affirming 257 Mo., 593;
Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 17 S. Ct., 56;
Hagar v. *Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;
Houck v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;
Saxton National Bank v. *Carswell*, 126 Mo., 436, 29 S. W., 279;
Corrigan v. *Kansas City*, 211 Mo., 608, 111 S. W., 115;
Ross v. *Gates*, 183 Mo., 338, 81 S. W., 1109;
French v. *Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;
McGhee v. *Walsh*, 249 Mo., 266, 155 S. W., 445;
Heman v. *Allen*, 156 Mo., 534, affirmed 181 U. S., 402, 21 S. Ct., 645;
Wagner v. *Baltimore*, 239 U. S., 207, 36 S. Ct., 66;
Wagner v. *Leser*, 239 U. S., 207, 36 S. Ct., 66;
Parsons v. *District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;

Tonawanda v. *Lyon*, 181 U. S., 389, 21 S. Ct., 609;
Construction Co. v. *Shovel Co.*, 211 Mo., 524, 111 S. W., 86.

II.

Ordinance No. 21831, providing for the grading of Meyer Boulevard, does not violate the United States Constitution.

Naylor v. *Harrisonville*, 207 Mo., 341, 105 S. W., 1074;
Heman v. *Allen*, 156 Mo. 534, affirmed as *Shumate* v. *Heman*, 181 U. S., 402, 21 S. Ct., 645;
Williams v. *Eggleston*, 170 U. S., 304, 18 S. Ct., 617;
Nichols v. *Kansas City*, 291 Mo., 690, 237 S. W., 107;
Spencer v. *Merchant*, 125 U. S., 345, 8 S. Ct., 921;
Brougham v. *Kansas City*, 263 Fed., 115;
Carson v. *Sewer Commissioners*, 182 U. S., 398, 21 S. Ct., 860;
Fallbrook Irrigation Co. v. *Bradley*, 164 U. S., 112, 17 S. Ct., 56;

(a) The grading of Meyer Boulevard is an improvement of such a nature that its cost may lawfully be charged against a local benefit district.

Kansas City v. *Bacon*, 147 Mo., 259, 48 S. W., 860;
Kansas City v. *Bacon*, 157 Mo., 450, 57 S. W., 1075;
French v. *Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;

(b) The benefit district was not fixed arbitrarily.

Barber Asphalt Paving Co. v. *French,* 158 Mo., 534, 58 S. W., 934;
Chadwick v. *Kelley,* 187 U. S., 540, 23 S. Ct., 175;
McGhee v. *Walsh,* 249 Mo., 266, 155 S. W., 445;
Heman v. *Schulte,* 166 Mo., 409, 66 S. W., 163;
Keith v. *Bingham,* 100 Mo., 300, 13 S. W., 89;
Louisville & Nashville R. R. v. *Barber Asphalt Paving Co.,* 197 U. S., 430, 25 S. Ct., 466;
Kansas City v. *Ward,* 134 Mo., 172, 35 S. W., 600;
Bauman v. *Ross,* 167 U. S., 548, 17 S. Ct., 966;
French v. *Barber Asphalt Paving Co.,* 181 U. S., 324, 21 S. Ct., 625;
Houck v. *Little River Drainage District,* 239 U. S., 254, 36 S. Ct., 58;
Kansas City v. *Bacon,* 147 Mo., 259, 48 S. W., 860;
Corrigan v. *Kansas City,* 211 Mo., 608, 111 S. W., 115;
Kansas City Grading Co. v. *Holden,* 107 Mo., 305, 17 S. W., 798;
Mullins v. *Cemetery Assn.,* 268 Mo., 691, 187 S. W., 1169;
Northern Pacific R. R. v. *Seattle,* 46 Wash., 674, 91 Pac., 244;
Construction Co. v. *Shovel Co.,* 211 Mo., 524, 111 S. W., 86;
Voris v. *Pittsburgh Plate Glass Co.,* 163 Ind., 599, 70 N. E., 249;

(c) That a larger district was assessed with the cost of condemning land for the boulevard is immaterial.

Houch v. *Little River Drainage District,* 239 U. S. 254, 36 S. Ct., 58.

(d) That property not abutting on the improvement cannot be benefited as much as abutting property is immaterial.

Embree v. *Kansas City and Liberty Road District,* 240 U. S., 242, 36 S. Ct., 317;
Kansas City v. *Bacon,* 147 Mo., 259, 48 S. W., 860;
Kansas City v. *Bacon,* 157 Mo., 450, 57 S. W., 1075;
Walston v. *Nevin,* 128 U. S., 578, 9 S. Ct., 192;
Spencer v. *Merchant,* 125 U. S., 345, 8 S. Ct., 921;
Bauman v. *Ross,* 167 U. S., 548, 17 S. Ct., 966.

III.

The proceedings subsequent to the ordinance do not violate the Constitution of the United States.

Parsons v. *District of Columbia,* 170 U. S., 45, 18 S. Ct., 521;
Hagar v. *Reclamation District,* 111 U. S., 701, 4 S. Ct., 663;
Voigt v. *Detroit,* 184 U. S., 115, 22 S. Ct., 337;
Wight v. *Davidson,* 181 U. S., 371, 21 S. Ct., 616;
Pittsburg R. R. v. *Board of Public Works,* 172 U. S., 32, 19 S. Ct., 90;
In re Amsterdam, 126 N. Y., 158, 27 N. E., 272;

Walston v. Nevin, 128 U. S., 578, 9 S. Ct., 192;
Embree v. *Kansas City and Liberty Boulevard Road District,* 240 U. S., 242, 36 S. Ct., 317;
Winona & St. Paul Land Co. v. *Minnesota,* 159 U. S., 526, 16 S. Ct., 83;
St. Louis v. *Richeson,* 76 Mo., 470;
King v. *Portland,* 184 U. S., 61, 22 S. Ct., 290;
Neil v. Ridge, 220 Mo., 233, 119 S. W., 619;
First National Bank v. *Nelson,* 64 Mo., 418;
Nichols v. *Kansas City,* 291 Mo., 690, 237 S. W., 170;
Saxton National Bank v. *Carswell,* 126 Mo., 436, 29 S. W., 152;
Weyerhaueser v. *Minnesota,* 176 U. S., 550, 20 S. Ct., 485;
Kentucky Railroad Tax Cases, 115 U. S., 321, 6 S. Ct., 57;
Wells Fargo & Co. v. Nevada, 248 U. S., 165, 39 S. Ct., 62;
Kansas City v. *Huling,* 87 Mo., 203;
Barnes v. *Pikey,* 239 Mo., 398, 196 S. W. 883.

IV.

There was no testimony of excessive valuation, or of discrimination in valuation, or of any value at all.

22 Corpus Juris, 178, Sec. 122.
13 Ency. of Evi., 454.
Girard Trust Co. v. *Philadelphia,* 248 Pa., 179, 93 Atl., 947;
Wayland v. *Seattle,* 96 Wash., 344, 165 Pac., 113;

Marine Coal Co. v. *Pittsburgh M. & Y. R. R. Co.*, 246 Pa., 478, 92 Atl., 688;

Hildreth v. *City of Longmont*, 47 Col., 79, 105 Pac., 107;

Baltimore v. *Carol*, 128 Md., 68, 96 Atl., 1076;

Suffolk & C. Ry. Co. v. *West End Land Co.*, 137 N. C., 330, 49 S. E., 350;

Fort Collins Dev. Co. v. *France*, 41 Col., 512, 92 Pac., 953;

Savannah Ry. v. *Bufford*, 106 Ala., 303, 17 So., 395;

St. Louis I. M. & S. Ry. Co. v. *Magness*, 93 Ark., 46, 123 S. W., 786;

Denver & R. G. R. Co., v. *Heckman*, 45 Col., 470, 101 Pac., 976;

Kelly v. *Peoples Nat. F. I. Co.*, 262 Ill., 158, 104 N. E., 188;

Martin v. *N. Y. & N. E. Ry. Co.*, 62 Conn., 331, 25 Atl., 239;

Hamilton v. *Seaboard Air Line*, 150 N. C., 193, 63 S. E., 730;

Rev. St. Mo., 1919, Sections 13, 150, 13, 154.

V.

Even if it be established by competent evidence that the tax bills against complainants' lands exceed the special benefit thereto, such fact would not be sufficient to invalidate the tax bills.

St. Louis v. *Brewing Co.*, 96 Mo., 677, 10 S. W., 477;

Michael v. *St. Louis*, 112 Mo., 610, 20 S. W., 666;

St. Louis v. *Ranken,* 96 Mo., 497, 9 S. W., 910;
Chadwick v. *Kelley,* 187 U. S., 540, 23 S. Ct., 175;
Prior v. *Construction Co.,* 170 Mo., 439, 71 S. W., 205;
Heman Construction Co. v. *Wabash R. R.,* 206 Mo., 172, 104 S. W., 67.

VI.

The suit in the Circuit Court of Jackson County complies with the provisions of the charter and ordinances and comports with due process of law.

A. The suit complies with the charter and ordinances.

Sec. 24, of Art. VIII, Charter of Kansas City;
Collins v. *Jaicks,* 279 Mo., 404, 214 S. W., 397.

(1). The proceeding is in the name of the city.

State v. *Patton,* 42 Mo., 530;
Livingston v. *Coe,* 4 Neb., 379;
Beattie v. *Lett,* 28 Mo., 596;
Ammerman v. *Crosby,* 26 Ind., 451;
Smith v. *Watson,* 28 Ia., 218;
In re Clary's Estate, 112 Cal., 292, 44 Pac., 569;
Kansas City v. *Mastin,* 169 Mo., 80, 68 S. W., 1037.

(2). The proceeding is against the respective land owners.

Goodrich v. *Detroit,* 184 U. S., 432, 22 S. Ct., 397;

Jackson v. *Waterway District,* 85 Wash., 301, 147 Pac., 1140;
Reed v. *Cedar Rapids,* 137 Ia., 107, 111 N. W., 1013;
Black v. *McGonigle,* 103 Mo., 192, 16 S. W., 615;
State ex rel. v. *Lundquist,* 103 Wash., 339, 174 Pac., 440;
Lingo v. *Burford,* 112 Mo., 149, 20 S. W., 459;
Nemally v. Joest, 74 Ind., 409;
Fitzgerald v. *De Soto Special Road District,* 195 S. W., 695, (Mo.).

B. Even if the suit was defective, the defects are not fatal since the suit is not necessary to due process.

Saxton National Bank v. *Carswell,* 126 Mo., 436, 29 S. W., 152;
Voight v. *Detroit,* 184 U. S., 115, 22 S. Ct., 337;
Paulsen v. *Portland,* 149 U. S., 30, 13 S. Ct., 750;
Walston v. *Nevin,* 128 U. S., 578, 9 S. Ct., 192.

C. The suit comports with due process of law.

Kansas City v. *Duncan,* 135 Mo., 571, 37 S. W., 624;
Kansas City v. *Ward,* 134 Mo., 172, 35 S. W., 600;
Kansas City v. *Mastin,* 169 Mo., 80, 68 S. W., 1037;
Lent v. *Tillson,* 140 U. S., 316, 11 S. Ct., 825;
State v. *Blair,* 245 Mo., 680, 151 S. W., 148;
State ex rel. v. *Wilson,* 216 Mo., 215, 115 S. W., 549;

Doris v. *Pittsburgh Plate Glass Co.*, 163 Ind., 599, 70 N. E., 249;
Cleveland Ry. Co. v. *Porter*, 210 U. S., 177, 28 S. Ct., 647.

VII.

The suit in the Circuit Court finally determined all questions raised or involved therein, and all such questions are now res judicata.

Muskrat v. *U. S.*, 219 U. S., 346, 31 S. Ct., 250;
State ex rel. v. *Westport*, 135 Mo., 120, 36 S. W., 663;
Tregea v. *Modesto Irrigation District*, 164 U. S., 179, 17 S. Ct., 52;
Gibler v. *Mattoon*, 167 Ill., 18, 47 N. E., 319;
Morgan Creek Drainage Dist. v. *Hawley*, 255 Ill., 34, 99 N. E., 68;
People v. *Linda Vista Irrigation Dist.*, 128 Cal., 477, 61 Pac., 86;
Rialto Irrigation Dist. v. *Brandon*, 103 Cal., 384, 37 Pac., 484;
In re Union Railway Co., 112 N. Y., 61, 19 N. E., 664;
Gelston v. *Hoyt*, 3 Wheaton, 246;
Meriwether v. *Block*, 31 Mo. App., 170;
First Nat. Bk. v. *McCaskill*, 174 N. C., 362, 93 S. E., 905;
Christianson v. *King County*, 239 U. S., 356, 36 S. C., 114;

St. Louis v. *United Rys.*, 263 Mo., 387, 174 S. W., 78;

Spratt v. *Early*, 199 Mo., 491, 97 S. W., 925;

Little River Drainage District v. *Railroad*, 236 Mo., 94, 139 S. W., 330;

McGhee v. *Walsh*, 249 Mo., 266, 155 S. W., 445.

VIII.

Since the trial and judgment in this case, the Supreme Court of Missouri has decided a case involving the questions raised in this case.

Schmelzer v. *Kansas City*, 295 Mo., 322, 243 S. W., 946;

Forsyth v. *Hammond*, 166 U. S., 506, 17 S. Ct., 665;

Wade v. *Travis Co.*, 174 U. S., 499, 19 S. Ct., 887;

Mo. etc. R. Co. v. *Cade*, 233 U. S., 642, 34 S. Ct., 678;

Quinette v. *Pullman Co.*, (C. C. A. 8th Cir.) 229 Fed., 333, 143 C. C. A., 453;

Thomas Cusack Co. v. *Chicago*, 242 U. S., 526, 37 S. Ct., 190;

St. Louis etc. R. Co. v. *Quinette*, (C. C. A. 8th Cir.) 251 Fed., 773, 164 C. C. A., 7.

BRIEF OF THE ARGUMENT.

The charge that the charter, ordinance and proceedings thereunder are in violation of the United States Constitution naturally falls into three parts: first, the constitutionality of the charter provisions; second, the constitutionality of the ordinance; and third, the constitutionality of the proceedings thereunder. Of these in order.

I.

Section 28 of Article VIII of the Kansas City Charter does not violate the Constitution of the United States.

The usual procedure for grading streets, avenues and public highways of every character is laid down in Section 3 of Article VIII of the charter (Trans. 30-34). This section provides that the cost of all grading shall be charged as a special tax on all lands on both sides of the highway graded. If the land is laid off into blocks, the assessment goes to the center of the block whether fronting on the highway or not (or to the alley only, if the council so prescribe by ordinance). If not laid off into blocks, then the assessment goes back one hundred fifty feet. The assessment is according to the value, exclusive of improvements (Trans. 33). A special assessment of the value is made by the City Assessor (Trans. 33).

Substantially the same procedure has been in force in Kansas City since 1889. Charter of Kansas City, 1889,

Art. IX, Sec. 5. Its validity had been thoroughly established.

West v. *Burke*, 286 Mo., 358, 228 S. W., 775;
Nichols v. *Kansas City*, 291 Mo., 690, 237 S. W., 107.

Even where the assessments amounted to a very large proportion of the value of the abutting property.

Nichols v. *Kansas City*, 291 Mo., 690, 237 S. W., 107.

Apparently, however, this method had been found in some instances to throw too heavy a burden upon the property fronting on the improvement. Unlike the cost of paving, which is substantially the same wherever laid, the cost of grading differs tremendously and has less relation to the effect on immediately abutting property. In some cases, the cut or fill may be sufficient to leave such property practically worthless (Trans. 70).

To meet this situation, the present charter (adopted in 1908) added Section 28 of Article VIII, permitting the cost of grading in certain cases to be spread over a larger benefit district. Section 3, providing for ordinary grading of streets, remains in effect, and may be followed in the discretion of the council in grading any highway. Section 28 is an alternative procedure, to be followed when, in the opinion of the council, the cost warrants it. The determina-

tion of the council is made final on this question (Trans. 28). Section 28 (Trans. 27-30) provides in substance:

> When, in grading any highway, a very large or unusual amount of filling in or cutting away is necessary, necessitating an expense so large as to impose too heavy a burden on the land situated in the benefit district limited in Section 3, the cost of grading may be charged as a special tax on lands benefited thereby in proportion to the benefits accruing to the several parcels, exclusive of improvements, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall be prescribed and determined by ordinance. The finding of the Council as to the amount of work and expense shall be conclusive.
>
> The work shall be provided for by ordinance, and the City may provide that the City shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under this section with the cost of the work. The City shall allege the passage and approval of the ordinance, the approximate cost of the work the limits of the benefit district prescribed by the ordinance, and the prayer of the petition shall be that the court find and determine the validity of the ordinance and the question whether or not the respective tracts in the benefit district shall be charged with the lien of such work as provided in the ordinance.
>
> Service in such proceeding shall be governed by the provisions of Section 11 of Article XIII of the charter. The City shall have the right to offer evidence tending to prove the validity of the ordinance and of the proposed lien, and the property owners shall have the right to introduce evidence tending to show the invalidity of the ordinance and of the lien against the respective lots. The court shall determine whether or not the parcels of each defendant should be charged with the lien.

Trial shall be in accordance with the Constitution and laws of the state, and the court shall render judgment either validating the ordinance and lien against the lots in the benefit district or against such lots as are found legally chargeable, or may render judgment that the ordinance and lien are in whole or in part invalid.

An appeal may be taken within ten days.

If the ordinance be sustained, the City may make a contract for the work, and after the work is completed, the estimate of cost and the apportionment thereof against the parcels in the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor as provided in Section 3, and all the provisions of Section 3 relating to the apportionment and the levy, issue and collection of tax bills as in grading proceedings, shall apply to tax bills issued hereunder, except as to the number of installments.

Nothing in this section shall affect any previous section, the intention of this section being to provide an independent and separate method of improvements made under the provisions hereof.

There can be no serious question, in view of the authorities, that this Section 28 is constitutional. It provides for an ordinance authorizing the grading and establishing a benefit district; for a hearing after notice on the validity of the ordinance; for the doing of the work and the determination of its cost; for the apportionment of that cost against the lands in the benefit district according to the assessed value thereof, a special assessment being authorized for the purpose.

The only possible attack that can be made upon the constitutionality of this section is the one made by defend-

ants in the District Court. It was there stated by them as follows:

> "The method of apportionment provided for in Section 28 of Article VIII of the charter is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the Fourteenth Amendment to the Federal Constitution."

Apparently this attack is made upon the plan as a plan, and not simply in its application to the present proceedings. It is urged that in almost no conceivable case can an apportionment of cost over a benefit district according to the assessed valuation of the lands, be defensible; that necessarily lands abutting on or nearer to the improvement are more greatly benefited than lands farther away; that therefore the assessments must decrease as distance from the improvement increases, or the assessments will be void. Since, under the plan of apportionment according to value, the assessments cannot so decrease, but on the contrary may actually increase, it is said that the whole plan is arbitrary and unconstitutional.

The theoretical basis of special assessments and the practical considerations which prevent the attainment of absolute justice in the application of any definite rule or method, are too well understood to require restatement. Courts of last resort have again and again recognized the impossibility of theoretical exactness in these matters, and upheld plans only roughly approximating the acknowledged principle of apportionment according to benefits.

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S., 112, 17 S. Ct., 56, this Court, at page 176 of the opinion,

uses the following language with reference to apportionment based upon assessed value:

> "Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it; yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to demonstrations in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made and where the fact of some benefit accruing to all lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law."

It is now settled beyond all possibility of doubt that the method of distributing cost provided for in Section 28, of Article VIII of the Charter of Kansas City—i. e. distribution in proportion to the assessed valuation of the respective tracts, exclusive of improvements, as fixed by the assessor for the purposes of the assessment proceeding—is a valid and constitutional method of apportionment.

Embree v. *Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct. 317, affirming 257 Mo., 593;

Fallbrook Irrigation District v. *Bradley*, 164 U. S., 112, 17 S. Ct., 56;

Hagar v. *Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

Houck v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;

Saxton National Bank v. *Carswell*, 126 Mo., 436, 29 S. W., 279;

Corrigan v. *Kansas City*, 211 Mo., 608, 111 S. W., 115;

West v. *Burke*, 286 Mo., 358, 228 S. W., 775.

The theory that cost should be distributed over the district in exact proportion to the special benefits received by each parcel is recognized by the courts, but it is nevertheless frankly admitted that no method can do more than approach the goal and the courts therefore universally uphold all methods of distribution which tend, to a reasonable extent, to make the assessments proportional to the benefits.

Thus the cost may be distributed in proportion to frontage on the street improved.

Ross v. *Gates*, 183 Mo., 338, 81 S. W., 1109;

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625.

Or in proportion to area.

McGhee v. *Walsh*, 249 Mo., 266, 155 S. W., 445;

Heman v. *Allen*, 156 Mo., 534, affirmed 181 U. S. 402, 21 S. Ct., 645;
Houck v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58.

Or at a fixed sum per front foot.

Wagner v. *Baltimore*, 239 U. S., 207, 36 S. Ct., 66;
Wagner v. *Leser*, 239 U. S., 207, 36 S. Ct., 66;
Parsons v. *District of Columbia*, 170 U. S., 45, 18 S. Ct., 521.

None of these methods of apportionment is ideal. All have flaws. The unconstitutionality of each method has often been urged upon the courts. In *French* v. *Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct., 625, it was strenuously argued that the front foot rule of assessment is invalid and violative of due process of law, because it takes no account of actual benefits. In *Tonawanda* v. *Lyon*, 181 U. S., 389, 21 S. Ct., 609, the front foot rule was objected to because it made no provision for an inquiry into the value of the abutting lots. In *Houck* v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58, the fixed tax per acre was alleged to be unconstitutional because the lands in the district vary in value, and the level tax was assessed without regard to the relative value of the respective tracts and without regard to benefits. In *Corrigan* v. *Kansas City*, 211 Mo., 608, 111 S. W., 115, the court says (p. 631):

> "Appellant's sixth point is that the uniform tax of two and one-half mills on the dollar, as shown by the city assessment rolls, ignores the question of benefits, and assesses all the property alike in the face of the

obvious fact that all is not to the same degree benefited. That is the same argument that has been in the past urged with so much force to show that the front foot rule of assessment for street improvement was invalid. This Court has expressed its opinion too often on that subject to render further discussion of it necessary."

The conclusion of the whole matter is admirably summarized by the Supreme Court of Missouri in *Construction Co.* v. *Shovel Co.*, 211 Mo., 524, 531, 111 S. W., 86, as follows:

> "It is within the power of the legislature to create special tax districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage. (*Webster* v. *Fargo*, 181 U. S., 394; *Prior* v. *Construction Co.*, 170 Mo., 439; *Asphalt Co.* v. *French*, 158 Mo., 534; *Spencer* v. *Merchant*, 125 U. S., 345; *Egyptian Levee Co.* v. *Hardin*, 27 Mo., 495)."

There can be no doubt, under the authorities, of the constitutionality of Section 28.

II.

Ordinance No. 21831, providing for the grading of Meyer Boulevard, does not violate the United States Constitution.

This ordinance carries out exactly the terms of Section 28 of Article VIII of the charter, and cannot therefore, be unconstitutional, unless it be in one particular, namely, in fixing the benefit district. For present purposes, that is the only

thing done by the ordinance which represents independent decision or action. The question, then, reduces itself to this: Is the benefit district fixed by the ordinance of such a nature as to render the ordinance unconstitutional?

A.

In determining this question, it must at all times be kept in mind that the question is not in the first instance a judicial one, but a legislative one. It is plain that no clear line can be drawn between public improvements—public in the sense that the entire municipality is interested therein to the exclusion of any particular locality, and local improvements—local in the sense that a particular locality is especially concerned. It is equally plain that no hard and fast rule can be laid down to determine exactly what extent of territory is specially concerned and exactly in what degree.

It has become firmly established that the primary duty of deciding these matters is placed by our form of government upon the legislative department, and that the decision of that department is conclusive, subject only to the limitation hereinafter mentioned. And this is true, as in all matters of legislation, without any notice to property owners or any hearing on the question whatsoever.

Naylor v. *Harrisonville,* 207 Mo., 341, 105 S. W., 1074;
Heman v. *Allen,* 156 Mo., 534, affirmed as
Shumate v. *Heman,* 181 U. S., 402, 21 S. Ct., 645;
Williams v. *Eggleston,* 170 U. S., 304, 18 S. Ct., 617;
Nichols v. *Kansas City,* 291 Mo., 690, 237 S. W., 107.

In *Spencer* v. *Merchant*, 125 U. S., 345, 8 S. Ct., 921, the court says (l. c. 357):

> "The legislature itself determined what lands were benefited, and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined by the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature."

Quoting further (l. c. 353):

> "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion upon the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the de-

termination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes."

B.

There is, however, one limitation to this legislative power: its exercise must not be so unreasonable as to be arbitrary. The legislative body is presumed to proceed upon investigation and to act with reference to the requirements of the public good. The presumption is that it creates a taxing district and charges the expense of an improvement upon that district, only when satisfied that the improvement is of special benefit to the property in the district and that the amount of such benefit will be in excess of the tax. So long as the legislative body does not act arbitrarily, this presumption will prevail.

It is not competent, therefore, for the courts to consider whether as an original proposition, the cost of grading Meyer Boulevard should be charged against a local district or paid by general taxation. The courts are not authorized to pass as in the first instance, upon the question

where the limits of the district should be established. They may not weigh the advantages and disadvantages of various rules of apportionment and declare the tax bills illegal because the cost was not distributed in accordance with the rule deemed by them to be the most equitable. The issue is merely as to whether the legislative and municipal authorities acted beyond the bounds of reason. As said in *Brougham* v. *Kansas City*, 263 Fed., 115, the judgment of the court as to the expediency or necessity of the action taken cannot be substituted for the judgment of the body delegated by law with the power and responsibility of acting with respect to such questions. The true rule is that unless there clearly appears to be an abuse of legislative discretion, the courts cannot interfere.

Carson v. *Sewer Commissioners*, 182 U. S., 398, 21 S. Ct., 860;
Fallbrook Irrigation Co. v. *Bradley*, 164 U. S., 112, 17 S. Ct., 56.

The question presented to the court, in view of these authorities, is not whether the grading of Meyer Boulevard is a public improvement or a local improvement, not whether the benefit district charged with its cost is the best district that could be fixed; but whether the action of the council in determining the grading to be a local improvement and in fixing the limits of the district, was arbitrary and hence an abuse of legislative discretion. Unless the record requires an affirmative answer to this question, the validity of the ordinance must be sustained.

C.

(a) The grading of Meyer Boulevard is an improvement of such a nature that its cost may lawfully be charged against a local benefit district.

It is certainly the general, if not the universal, method prescribed in city charters for grading streets, avenues and highways, that the cost shall be levied against the property in a benefit district. Even the front foot rule really involves a benefit district, consisting of the abutting property within a certain distance of the highway. As already shown, the Kansas City charter provides that ordinary grading shall be paid for by a district abutting on the improvement and extending back approximately one hundred fifty feet. Certainly at this late day, no further citation of authorities is necessary to sustain the validity of this provision.

The present proceeding had for its object the grading of an avenue or highway, to-wit, Meyer Boulevard, and no sufficient reason has been suggested for excluding it from the terms "avenue or highway." Every avenue contains in addition to the paved roadway, a considerable amount of parking and space for trees and other embellishments. We know of no rule fixing the percentage of roadway or parking or limiting the width of parking or forbidding flowerbeds.

It was urged below that the boulevard partook much more of the nature of a park than of a highway and the District Judge in his opinion calls it a "super-boulevard" (Trans. 130) and states that it was conceived for the purpose of establishing an inspiring approach to Swope Park and incidentally as a thoroughfare (Trans. 128). But never-

theless, it is a highway, which is defined by Webster as a thoroughfare, and it is an avenue, which is defined as a broad street lined with trees. That it partakes largely of the nature of a park does not prevent it from being a local improvement. The very Swope Park to which it constitutes an approach is a local improvement for which assessments might have been levied against a benefit district.

In *Kansas City* v. *Bacon*, 147 Mo., 259, 48 S. W., 860, the court held that the entire cost incident to the condemnation of land for North Terrace Park, in Kansas City, could legally be assessed against a local benefit district. The Court says (l. c. 273):

> "That the condemnation of land for a public park is for a public use, must be conceded; otherwise there is no foundation for the exercise of the right of eminent domain. The recent authorities are uniform. (*Kansas City* v. *Ward*, 134 Mo., 172; *County Court* v. *Griswold*, 58 Mo., 175; *Shoemaker* v. *U. S.*, 147 U. S., 297, and cases cited).
>
> But a public park is not only a public use, but throughout the States of this Union, it is held to be a local improvement, conferring such benefits in the way of increased value to the land in the benefit district in which it is situated, as to justify special assessments against private property to pay the compensation for the land condemned for such park. The argument of the learned counsel for defendants, pressed to a logical conclusion, amounts to a denial of the right of the legislative body to define the benefit district. This court and the highest courts, Federal and State alike, have long ago repudiated the reasoning of appellants, and we see no reason for reversing decisions that have so long stood the test of judicial investigation, or for repeating the grounds upon which they are based."

In *Kansas City* v. *Bacon,* 157 Mo., 450, 57 S. W., 1075, local assessments were sustained to pay for the cost of the establishment of Penn Valley Park in Kansas City.

In *French* v. *Barber Asphalt Paving Company,* 181 U. S., 324, 21 S. Ct., 625, we find the following:

> "Whether the expense shall be paid out of the general treasury or be assessed upon abutting property or other property specially benefited * * * is * * * a question of legislative expediency."

(b) The benefit district was not fixed arbitrarily.

Bearing in mind that exact equality of burden is an impossibility and hence unnecessary, and that the courts can only interfere when the legislative action is arbitrary and cannot substitute their own discretion or opinion for that of the legislative body, the courts have laid down certain general principles to govern their decisions in dealing with benefit districts.

In the first place, it has been definitely established that instances of individual injustice will not invalidate the legislative action in fixing the district. Proof that a particular assessment against a particular tract exceeds in amount the benefits accruing to that tract will not suffice to defeat the assessment.

> *Barber Asphalt Paving Co.* v. *French,* 158 Mo., 534, 58 S. W., 934.

The individual tax may even exceed the value of the land against which it is assessed.

> *Chadwick* v. *Kelley,* 187 U. S., 540, 23 S. Ct., 175.

The topography of the benefit district may be such that with respect to certain portions thereof there may be no possibility of benefit from the improvement, and yet the assessments against these portions will be enforceable.

McGhee v. *Walsh*, 249 Mo., 266, 155 S. W., 445;
Heman v. *Schulte*, 166 Mo. 409, 66 S. W., 163.

Indeed, the fact that the improvement damaged, rather than benefited, certain of the assessed property is immaterial.

Keith, v. *Bingham*, 100 Mo. 300, 13 S. W., 89.

The question is, not whether the individual assessment exceeds the individual benefit to the particular lot, but whether the total assessment exceeds the total benefit to the district.

Moreover, and in the second place, even this excess of total assessment over total benefit must be gross—so far out of all reasonable proportion as to be entirely indefensible. Reasonable latitude must be allowed because exactness is impossible of attainment.

In *Louisville & Nashville R. R.* v. *Barber Asphalt Paving Company*, 197 U. S. 430, 25 S. Ct. 466, the Supreme Court, at page 433 of the opinion, uses the following language in upholding a paving tax levied in proportion to the area of the lots in the benefit district:

"There is a look of logic when it is said that special assessments are founded on special benefits and that a

law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. * * * A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And that has been the implication of the cases. *Davidson* v. *New Orleans*, 96 U. S. 97, 106; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 692; *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 55; *Detroit* v. *Parker*, 181 U. S. 399, 400; *Chadwick* v. *Kelly*, 187 U. S. 540, 544."

The court below apparently put its decision upon the finding that the total tax bills unreasonably exceed any possible benefit to the total benefit district. We will discuss the propriety of this finding later. Before doing so, the action of the city authorities from a legislative standpoint should be considered.

Swope Park had previously been acquired. The land

for Meyer Boulevard had been condemned and the grade established. The next step was the actual work of grading.

The proper boards and the council determined that the cost would be too great for apportionment over the usual benefit district, and that, therefore, the larger benefit district provided for in Section 28 should be established. The charter makes this decision conclusive, and apparently the district court approved of it (Trans., 131). The council fixed the limits of such district by ordinance, under the recommendation of the Park Board.

In view of the presumption in favor of such action and of the testimony introduced on the point, it seems utterly incomprehensible to us that this benefit district could be held arbitrary. The adverse decision of the district court can be accounted for in but one way—that the court erred in admitting and gave improper and undue weight to the assessments of the property for general taxation. That will be discussed later. At this time, we desire simply to call attention to the considerations which determined the action of the council in fixing the district.

W. H. Dunn, Superintendent of Parks of Kansas City, connected with the Park Department for twenty-two years, testified that the boulevard was laid out through unplatted, acreage property extending from 63rd Street on the north to 67th Street on the south. South of 67th Street, the land had been platted into small ownerships. North of 63rd Street, much the same condition existed. Acreage property can more feasibly be made to conform to the improvement than property in small subdivisions and ownerships. Grading a boulevard is customarily a benefit to the property adjacent to it and on adjacent streets connected with it. A

boulevard like this could not be put through that class of undivided property without putting it on the market and giving benefit to it. Meyer Boulevard constitutes of course an important artery in the whole park system. It was for this reason that the benefit district was enlarged beyond the district ordinarily assessed with the cost of grading. It is generally true that abutting property receives more special benefits than property at a distance (Trans., 102-105).

Charles C. Craver, a real estate man for twenty years, member of the Park Board at the time of the proceedings in question, testified that the first thing considered was the burden of placing the whole cost on abutting property. So much of the property was below grade and affected adversely by the grade, that it was thought best to establish a larger benefit district. The judgment was largely influenced by the measure of benefit to adjacent property and how far that benefit would extend. A benefit district is largely a matter of compromise. In this instance, 63rd Street was considered a reasonable northern boundary because traffic originating north of 63rd Street would naturally flow north, and 63rd Street was an open and traveled street at that time. 67th Street was also open and though not fully improved, was in contemplation as a traffic way. South of 67th Street, the property was platted into small lots, sold on the installment plan, with small houses occupied by poorer people. The nature of the country south of 67th Street was such that it could not be improved so as to get full benefit of the improvement, and it was therefore thought unfair to extend the district farther. A compromise was finally reached, and the district fixed as shown. The judgment of the board at that time is still my judgment (Trans., 105-107).

He further testified that it would be impracticable for people living south of 67th Street to go direct to Meyer Boulevard because of the grade leading up to it from the south. Some of the property on the south is as much as fifteen or eighteen feet below grade. Furthermore, it is a class of property served more by street cars than by boulevards. The grading of the boulevard through open, unimproved property affects the property very favorably in value. The benefit is not confined to the abutting property, but extends back a considerable distance depending upon the particular circumstances. The property both north and south of the boulevard in the district increased in value by the grading, especially that on the north, which is above grade and of a better class. The benefit is greater on unimproved property than on platted property. (Trans. 107.)

Mr. Craver also testified, in answer to questions by the court, that the fixing of the benefit district was a matter of compromise. He explained what he meant by compromise: that interested people appeared before the Board and presented their ideas; that the Board heard them, went over the matter and then reconciled the divergent ideas of the board (Trans. 112-113).

Cusil Lechtman, a member of the Park Board at the time of the proceedings in question, testified that in arriving at the limits of the district he considered the extent of the direct as distinguished from the consequential benefits. Because 63rd Street on the north was already quite a thoroughfare and a street car line was contemplated on 67th Street, because the land north of 63rd Street was platted and that south of 67th Street laid out into small lots, and because the land between the two streets was unplatted and had no im-

provements, he fixed the direct benefit between the two streets. The improvement no doubt benefited the whole city, but the greatest benefit is to close-by property. It causes an immediate benefit to nearby property (Trans. 113).

It is difficult to conceive that even a court could take a fairer attitude toward a difficult question, give a clearer consideration to the circumstances and necessities of the situation, or reach a more just result. We earnestly request that the testimony of the witnesses Dunn, Craver and Lechtman be carefully considered by the court. It is comparatively easy to point out theoretical weak spots in the district as fixed, but we challenge all objectors to offer any practical limits that will not involve more glaring defects than the limits established by the council. The district has been held to be unreasonable and arbitrary; but the pleadings, record and opinion of the lower court will be read in vain to find whether it is unreasonably small or unreasonably large, and what, if any, definite parcels should have been included or excluded to make it reasonable.

The allegations of the bill regarding the unreasonableness of the district, charge that land on the north not benefited was included, and land on the east and south benefited was excluded (Trans., 13); that the district was too small in view of the character of the improvement (Trans., 13); and that the land north of the boulevard is more than double the land south, whereas it is an obvious fact that owners and occupants of land south will have use of the boulevard while those north will have practically none (Trans., 13-14).

In support of these allegations, the complainants introduced the opinions of two real estate dealers, Garrett Elli-

son and H. V. Jones. Mr. Ellison testified that in his opinion Tracts 14 and 15 received a slight local benefit, but only a very small one. The property would have brought very little, if any, more on the market after than before the grading. Much the same was true of Tracts 2, 3, 8 and 11. Tracts 2 and 3 may have sustained an actual detriment. The greater part of the benefit from the grading was received by the property abutting on the boulevard, except that considerably below grade. Next in the matter of benefit would come the land south, next the property north. The nearer the boulevard, the greater the benefit as a general rule (Trans., 67-73).

Mr. Jones testified that Swope Park received a special benefit, the boulevard being a connection between the Park and the city. The property south of the boulevard received considerable of the special benefit. Tracts 14 and 15 received very little, if any, benefit; Tract 11, very remote benefit; Tract 2, none; Tract 3, much the same, except that the south end did receive some benefit, disappearing toward the north; Tract 8, very small benefit. It is very difficult to state the exact amount of benefit in dollars and cents, but it is far less than the amount of tax.

He further testified that the 150 feet just south of 63rd Street was not increased in value, whereas the 150 feet fronting on the boulevard was enhanced in value. The special benefits extended south as far, at least, as 75th Street. Both north and south, the benefit decreases as the distance from the boulevard increases. In some instances, there is a tendency for the best residences to recede from the boulevards. All property in the immediate neighborhood of all these boulevard improvements has been in most

instances specially benefited by the improvements (Trans., 82-86).

Mr. Kelly Brent, called on behalf of the appellants, testified that he was familiar with the character of the benefit district and with the character of the property north and south of the district and that, in his opinion, the district as fixed, was a reasonable one upon which to assess the cost of the improvement. He emphasized the fact that all of the land within the benefit district was acre property, unplatted and undeveloped, and that the boulevard would be a great benefit to it in opening it up and putting it on the market. He also brought out the fact that the property south of 67th Street had been platted into small tracts and developed in such a way that it would not be benefited materially by the opening of the boulevard. He stated that the property north of 63rd Street had been platted into relatively large tracts and built up for residence purposes and that the character of this property had been more or less fixed by the existing improvements and would not be benefited by the boulevard as much as the property between 63rd Street and 67th Street. Mr. Brent further testified that grading Meyer Boulevard damaged some of the dwelling property, inasmuch as over 50% of the property abutting on the boulevard was below the grade of the boulevard. He stated that the property on 65th Street would be as much, if not more, benefited by the grading than the property immediately abutting on the boulevard (Trans., 114-116).

Mr. John A. Moore, called as a witness on behalf of appellants, testified that he had had thirty-five years' experience in the platting and selling of residence property

in Kansas City, Missouri, and that he was familiar with the real estate values in the benefit district in question. He stated that, in his opinion, the district fixed by the ordinance for the grading of Meyer Boulevard was a reasonable one, for the reason that the property included within the district, being unplatted and undeveloped property, was susceptible of a better improvement than property already built up. The property south of 67th had been platted into small lots and built up with small cottages and its character had thereby been established as a low class district and the boulevard would not materially improve it. The property north of 63rd Street had been platted and improved and, therefore, the boulevard would not materially affect it. He stated that it was practically impossible to change a neighborhood once built up and that he had observed that boulevards constructed through poor neighborhoods did not have the effect of changing the character of the district and poor buildings continued to remain on the boulevard. If, however, a boulevard runs through or near a large vacant unplatted tract, it makes possible a development of the tract on a large scale and very great benefits result. Mr. Moore also stated that while, as a rule, the development of a boulevard more favorably affects directly abutting property, this is not always the case and that with regard to this particular improvement, a considerable amount of the abutting property was practically destroyed in value because of the fact that so much of the abutting property was very much below the grade of the boulevard (Trans., 116-117).

It is not apparent why the testimony of the witnesses Ellison and Jones should prevail over that of witnesses Brent and Moore. The testimony of all is opinion merely,

based upon their own personal ideas of real estate values, unconsciously colored perhaps by the natural leaning of experts toward the side that calls them. Properly enough, they focus attention on the considerations most favorable to that side and minimize those less favorable.

It is still less apparent why this testimony should be accepted as overthrowing the well-considered judgment of the legislative body charged with the duty of determining a practical benefit district for the purpose of grading this boulevard. Not one of these witnesses denied that the improvement was a special benefit to the district as a whole; or that the benefit to the district as a whole was less than the total assessment therefor. Not one affirmed that a single ground upon which the council acted in limiting the district was not well founded and entitled to weight; or that these grounds were not, taken together, ample to justify the district as fixed.

Giving this testimony its utmost weight, it tends to show that in the opinion of witnesses Ellison and Jones; first, the city as a whole derived a large benefit from the improvement; second, Swope Park received special benefit; third, Tracts 8, 11, 14 and 15 received very little special benefit, and Tracts 2 and 3 practically none; and fourth, the lands south of 67th Street to 75th Street were specifically benefited. That is everything, so far as the benefit district is concerned. If the validity of assessments for public improvements is to depend upon the opinion of real estate dealers upon values and increases of value, then no proceedings for such purpose can withstand attack.

Of course, the city at large derived a benefit from the

improvement. As said in *Kansas City* v. *Bacon*, 147 Mo. 259, 273, above cited: "That the condemnation of land for a public park is for a public use, must be conceded; otherwise there is no foundation for the exercise of the right of eminent domain."

Where the charter, as in the present section, leaves to the city authorities the determination of the question as to whether any part of the cost shall be paid by the city, the decision of the city authorities is conclusive, and not subject to review.

Kansas City v. *Ward*, 134 Mo., 172, 35 S. W., 600;
Bauman v. *Ross*, 167 U. S., 548, 17 S. Ct., 966;
French v. *Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct. 625;
Houck v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;
Kansas City v. *Bacon*, 147 Mo., 259, 48 S. W., 860.

It may be, too, that Swope Park received some benefit. Whether the park should bear any part of the cost is conconclusively for the determination of the council.

Corrigan v. *Kansas City*, 211 Mo., 608, 11 S. W. 115;
Kansas City v. *Bacon*, 147 Mo., 259, 48 S. W., 860.

Possibly lands south of 67th Street might justifiably have been included. It is well settled that the circumstance that property outside of the benefit district is bene-

fited by the improvement does not make the district as established unreasonable.

Kansas City Grading Co. v. *Holden*, 107 Mo., 305, 17 S. W., 798.

And as we have already shown, the inclusion of particular tracts that are little benefited, or not benefited at all, or actually damaged, will not defeat the legislative action.

The presumption is that the district as established is reasonable.

Mullins v. *Cemetery Association*, 268 Mo., 691, 187 S. W., 1169;
Northern Pacific R. R. v. *Seattle*, 46 Wash., 674, 91 Pac., 244.

It is not possible that this presumption can be overcome by such testimony as this. Nor can there be found in the record a single statement or fact supporting the conclusion of the lower court that the total tax bills unreasonably exceed the benefit to the total benefit district. There is a complete failure of evidence in this matter.

The contention that the district is unreasonable and arbitrary because more land is included north of the boulevard than south of it is entitled to no weight whatsoever. The power to fix the district must of necessity include the power to determine how far on either side the benefit extends. Whatever inequalities may result from the establish-

ment of a district according to the judgment of the council as to the property benefited, would be infinitely increased in most instances should the charter require that the district must extend an equal distance on each side of the improvement.

As a matter of reason and common sense, the mere ir regularity of a benefit district cannot be a ground for holding it arbitrary. Indeed, its regularity might well be considered a more logical ground for so holding, since it is doubtless very rarely that special benefits accurately follow the lines of the compass and the square. As a matter of authority, districts much more irregular than the present have been sustained by the courts.

Construction Co. v. *Shovel Co.*, 211 Mo., 524, 111 S. W., 86, sustains an irregular district, extending 700 feet from the improvement in one direction, and only 35 feet in another.

In *Voris* v. *Pittsburgh Plate Glass Co.*, 163 Ind., 599, 70 N. E., 249 and in *Cleveland Ry. Co.* v. *Porter*, 210 U. S., 177, 28 S. Ct., 647, a statute of Indiana, known as the Barrett Law, is held to be constitutional. That statute fixes the cost of paving in the first instance upon the abutting property extending back from the street to a distance of 50 feet, The assessment proceedings are had with reference merely to this 50-foot strip. The published notice to property owners describes merely the 50-foot strip. The statute then provides that if the respective lots in this district are sold to satisfy the tax bills issued against them, and prove insufficient in amount, the land immediately behind the lots

sold, back to a distance of 150 feet from the street, shall be subject to the lien of the unpaid balance of the tax bills. As a result, the boundary of the benefit district finally fixed may be an irregular line, jumping alternately back and forth from points 50 and 150 feet from the street.

In *Spencer* v. *Merchant*, 125 U. S., 345, 8 S. Ct., 921, and other cases sustaining reassessment statutes, the benefit district is necessarily irregular, since it consists of only those tracts in the original benefit district whose assessments had not been paid. In such a case the tracts in the district fixed by the reassessment law may not even be contiguous.

The absurdity of the contention cannot be better illustrated than by a reference to the actual result in the present proceedings. Here is a broad, open, unplatted area extending from 63rd to 67th Streets; a boulevard is to be graded through this area; if it is located in the mathematical center from north to south, the entire tract may, under the contention, be said to be benefited; if it is placed on a varying line averaging five hundred or six hundred feet south of the center, the entire tract may not, under the contention, be said to be benefited. And this without any consideration of the topography or development of the area and its surroundings.

In our opinion, after all the evidence is considered, the court cannot itself fix a more reasonable district than that fixed by the council. But even if it could suggest certain proper amendments, there is still no ground for holding the

district as fixed invalid. As is said in *Louisville & Nashville R. R.* v. *Barber Asphalt Paving Co.*, 197 U. S., 430, 435:

> "We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the 14th Amendment of the Constitution of the United States."

(c) The contention that the benefit district is illegal for the reason that a different, and much larger, district was assessed with the cost of condemning land for the boulevard has no merit.

The condemnation and grading proceedings are entirely separate, and represent distinct improvements of different character. This argument, if sound, would mean that the cost of grading or even of paving a street could not be assessed upon the abutting property, but must be spread over the same district as that established in the condemnation proceeding.

In *Houck* v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58, a statute is upheld which makes provision for two separate benefit districts for the same improvement—one to pay for the preliminary cost of determining whether or not the proposed work shall be done, the other to be assessed with the actual cost of the completed work. If there may be separate districts for the same improvement, the existence of separate districts for separate improvements should not cause doubt as to the legality of either district.

As a matter of fact, the condemnation proceedings in which Meyer Boulevard was established included many

blocks of boulevard not included in the grading proceedings and involved lands in three distinct park districts (Trans., 40-45).

In connection with the contention that the cost of this improvement should have been distributed over a much larger district, it is important to note that in the usual grading proceeding under the Kansas City Charter, cost is charged only upon lands back 150 feet from the graded street. Section 28 of Article VIII provides that if the fills and cuts are of such magnitude as to impose too heavy a burden upon this 150 foot strip, the Council may make provision for an enlarged district. It seems evident that a district *somewhat deeper than 150 feet* is contemplated. There is no warrant whatsoever for the assumption that only a district many times larger than the usual one—perhaps several miles in width—is authorized. The ordinary construction would be that the enlarged district contemplated in Section 28 of Article VIII is a district somewhat commensurate with the benefit district in the usual grading proceeding. Certainly there is no ground for holding that it must be either 150 feet or a whole Park District, and that the council is acting arbitrarily if it fix limits between the two.

Appellants further contend, with regard to the reasonableness of the benefit district, that this question was adjudicated in the proceedings filed in the Circuit Court of Jackson County as provided in the charter and ordinance and is therefore not now open for consideration. This will be discussed under a separate heading. (*Infra* VII).

(d) That property not abutting on the improvement cannot as a physical fact be benefited as much as property abutting thereon is both untrue and immaterial.

This contention, while apparently aimed at the fairness of this particular district, is in truth another form of attack on the general method of apportioning benefits according to assessed valuation. In every case where a benefit district is established and the assessment made according to value, no account is taken of distance from the improvement. This contention is disposed of in Point I, *supra.*

In *Embree* v. *Kansas City and Liberty Boulevard Road District,* 240 U. S., 242, 36 S. Ct., 317, property for a distance of one mile on each side of the boulevard is taxed in the same proportion, in accordance with the assessed valuation of the respective tracts. It would seem therefore that a district extending only three blocks from the boulevard could be charged according to a uniform standard throughout.

In *Kansas City* v. *Bacon,* 147 Mo., 259, 48 S. W., 860, the cost of the proceeding was spread over an entire park district, in proportion to the assessed valuation of the respective tracts. The court in that case did not require a graduated scale of apportionment though the benefit district was many times larger than the district in the present proceeding.

Kansas City v. *Bacon,* 157 Mo., 450, 57 S. W., 1075, conclusively settles the point against complainants' contention. It resulted in that case that certain lots very near the im-

provement were assessed in sums which amounted to $2.00 per front foot. Complainant's lots, a mile or more away, was taxed $50 per front foot. The court said at page 474 of the opinion:

> "In connection with this point is argued, what is claimed to be hardship and manifest inequality of the assessment. We are given as a conclusive illustration, the assessment of $2 per front foot on a lot very near the park, and $50 a front foot on appellant's property a mile or more away. That inequality is not so self-evident that it may be so declared as a matter of law. Two dollars a front foot on a lot in an unimproved and sparsely settled district remote from the center of trade might be in fact a greater rate *ad valorem* than fifty dollars a front foot, on a business lot in the heart of the traffic."

The legislature may provide for any reasonable method of apportionment of cost. If the method selected be a reasonable one, the legislative determination is not subject to review.

> *Walston* v. *Nevin*, 128 U. S., 578, 9 S. Ct., 192;
> *Embree* v. *Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317;
> *Spencer* v. *Merchant*, 125 U. S., 345, 8 S. Ct., 921;
> *Bauman* v. *Ross*, 167 U. S., 548, 17 S. Ct., 966;
> *French* v. *Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;
> *Houck* v. *Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58.

Moreover, the assertion of fact is not, as stated, "above dispute." It is not a physical fact that property at a

distance cannot and does not receive as much benefit as abutting property. There are many other facts, such as the nature of the district, its topography, the extent of cuts and fills, that must enter into the question. Complainants' witness Ellison testified that in some cases the value of abutting property might be entirely taken away (Trans. 70). Their witness Jones testified that in certain instances the best residences have a tendency to recede from the boulevards (Trans. 85). Can it be said that the council acted arbitrarily in finding that this was a case where, taking all these matters (and others) into consideration, a benefit district extending from 63rd to 67th Street was the best practical district? Was such action in the fact of "a physical fact, beyond dispute?"

Clearly no such showing has been made as to authorize the court, whose sole province is to determine, not the reasonableness of the district, but the reasonableness of the action of the council in fixing it, to hold the ordinance unconstitutional because the district is an arbitrary exercise of legislative power.

III.

The proceedings subsequent to the ordinance do not violate the Constitution of the United States.

Except for the provisions relative to the suit in the Circuit Court, the proceedings subsequent to the ordinance follow almost exactly the proceedings provided in Section 3 of Article VIII for ordinary grading. Indeed, Section 3 is referred to in Section 28 as establishing the necessary steps in making and paying for the grading. The only at-

tack made on these proceedings, except that on the Circuit Court suit which is discussed separately (Point VI, *infra*), is the contention that the assessment of values was without notice or hearing, was about four times the assessment for general taxes, and was arbitrary, unjust and excessive. Of these in order.

(1) The extent of the notice and hearing necessary in special assessment proceedings varies according to the nature of the action being taken. In general, it has been established that as to matters determined by the legislative body, no notice or hearing is necessary; as to delegated administrative matters, no notice or hearing is necessary: as to matters to be determined by courts, or officers or boards acting judicially, a hearing at some stage is essential.

Parsons v. *District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;
Hagar v. *Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;
Voigt v. *Detroit*, 184 U. S., 115, 22 S. Ct., 337.

Where cost is apportioned according to assessed valuation as provided in Sections 28 and 3, it may be that the action of the assessor in fixing the values is judicial. If so, the owners, at some point, are entitled to be heard on the question. Sections 28 and 3 do not in themselves provide for such hearing. Section 24 of Art. VIII provides, however, that tax bills issued under these proceedings are collectible only by action at law, after service duly had. The section further provides:

"That nothing in this section shall be so construed

as to prevent any defendant from pleading and proving in reduction of any bill any mistake or error in the amount thereof."

Does this section provide a sufficient hearing upon the question of assessment?

Notice and opportunity to be heard at every stage of the assessment proceedings are not required by due process of law.

Voight v. *Detroit*, 184 U. S., 115, 22 S. Ct., 337;
Wight v. *Davidson*, 181 U. S., 371, 21 S. Ct., 616;
Pittsburg R. R. v. *Board of Public Works*, 172 U. S., 32, 19 S. Ct., 90;
In re Amsterdam, 126 N. Y., 158, 27 N. E., 272.

Thus, if opportunity for a hearing is given at some later stage, no hearing need be had before the board or other body determining the benefits or fixing the valuation of the tracts for the purposes of the proceeding.

Walston v. *Nevin*, 128 U. S., 578, 9 S. Ct. 192;
Embree v. *Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct. 317;
Winona & St. Paul Land Co. v. *Minnesota*, 159 U. S., 526, 16 S. Ct., 83;
St. Louis v. *Richeson*, 76 Mo., 470.

An opportunity to file objections and to be heard thereon after the special taxes have been levied satisfies due process, although there be no other or prior notice.

In re Amsterdam, 126 N. Y., 158, 27 N. E., 272.

Similarly, a right of appeal from assessments, made without notice or hearing makes the proceeding constitutional.

King v. *Portland*, 184 U. S., 61, 22 S. Ct., 290.

If, therefore, the tax bills issued can be enforced only by suit, had after due service, and if the property owner can in such suit be heard upon the question of the assessment, then the requirements of due process are thereby met so far as the assessment is concerned. Opportunity to be heard in the collection proceeding satisfies the Fourteenth Amendment.

Under Section 24, the tax bills in controversy can be enforced only by suit, had after due service, and the property owner can in such suit be heard upon the question of the assessment. The right to such hearing is expressly given in the proviso quoted.

Embree v. *Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317;
Neil v. *Ridge*, 220 Mo., 233, 119 S. W., 619;
First National Bank v. *Nelson*, 64 Mo., 418;
Nichols v. *Kansas City*, 291 Mo., 690, 237 S. W., 107;

In *Saxton National Bank* v. *Carswell*, 126 Mo., 436, 29 S. W., 279, an identical provision in the Chapter of the Revised Statutes governing cities of the second class in Missouri, was held to mean that in the suit on the tax bill the owner may set up any defense he has, including the defense

that his land was over-valued by the city assessor, and a hearing may then be had on such question.

As pointed out by the court in *St. Louis* v. *Richeson*, 76 Mo., 470, this must be the sense of a provision, without more, that the tax bill can be collected only by suit.

There being, therefore, an opportunity for the owners to be heard in the suits on the tax bills, the procedure prescribed is due process. As the court says in *Winona & St. P. Land Co.* v. *Minnesota*, 159 U. S., 526, 16 S. Ct., 83:

> "Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or amount of it either before that amount is determined, or in subsequent proceedings for its collection."

Such is unquestionably the settled law.

Weyerhaueser v. *Minnesota*, 176 U. S., 550, 20 S. Ct., 485;

Kentucky Railroad Tax Cases, 115 U. S., 321, 6 S. Ct., 57;

Hagar v. *Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

Wells Fargo & Co. v. *Nevada*, 248 U. S., 165, 39 S. Ct., 62;

Kansas City v. *Huling*, 87 Mo., 203;

Barnes v. *Pikey*, 269 Mo., 398, 196, S. W., 883;

And cases hereinbefore cited under this Point.

(2) The allegation that the special valuation of complainants' property for the purposes of this proceeding is four times the assessment of the same property for general taxes is utterly irrelevant and immaterial to the question here involved. This for two reasons: first, because it makes absolutely no difference in the amount of the benefits levied against the land; and second, because the fact, if established, does not in any way indicate a wrongful valuation.

Under the provisions of the charter, the valuation of the land is important only as a measure of distribution among the various tracts charged with the benefits. It is the relative valuation only that matters; the absolute value is entirely unimportant. If the valuation of every tract in the district be divided in half, the distribution remains the same. If the valuation be multiplied by four, it makes not a penny difference, so long as each tract is treated alike. That complainants' property was quadrupled in value does not increase their liability unless at the same time other property in the district was not quadrupled. This is a mathematical certainty.

Moreover, there is no evidence whatsoever that four times the assessment of property for general taxes is not a fair estimate of its real value. We know of no ground upon which the assessment for general taxes, unless made by the owner himself, is admissible for any purpose or is competent to establish real value. This is considered later, under Point IV, *infra*.

(3) As to the allegation that the valuation was arbitrary, unjust and excessive, there is a complete failure of evidence. No witness attempted to put a value upon any

tract in the district and there is not a word in the record to suggest that one tract was valued too highly as compared with another. We have shown under (2) above that excessive valuation, if not discriminatory, does complainants no harm and can avail them nothing. Unjust valuation, unless discriminatory, has no meaning in these proceedings. Arbitrary valuation, in order to avoid the assessment, must be arbitrarily discriminatory as between tracts. There is absolutely no evidence of discrimination or indeed of the value of any particular tracts whatever, or of the district as a whole. The lower court was manifestly wrong in its findings as to value.

IV.

There was no testimony of excessive valuation, or of discrimination in valuation, or of any value at all.

The complainants offered no testimony as to the actual value of any tracts in the benefit district either before or after the grading. None was offered by the defendants. Yet the lower court found that "these tax bills amount to more than one-third of the actual value and that the benefit to complainants' property, if any, is negligible." (Trans. 131). The decision of the court setting aside the tax bills is based largely on this finding. The opinion shows that the court in reaching that result acted upon testimony wrongfully admitted in evidence over defendants' objection, entirely incompetent and of no probative value whatever—the assessments for general taxation for the years 1915, 1916 and 1917. The admission of the assessments was error

and the conclusions based thereon are not supported by any competent testimony.

No case has been found where an assessment for taxation made solely by public officials has been held competent to establish value, either against the owner or the municipality. The universal rule is to the contrary.

22 Corpus Juris, 178, Sec. 122;
13 Ency. of Evi. 454.

In condemnation proceedings it has been consistently held that assessments, unless the value is fixed by the owner, are not competent even against the city to show real value.

Girard Trust Co. v. *Philadelphia,* 248 Pa. 179; 93, Atl. 947.
Wayland v. *Seattle,* 96 Wash. 344, 165 Pac., 113;
Marine Coal Co. v. *Pittsburg M. & Y. R. R. Co.,* 246 Pa. 478, 92 Atl., 688;
Hildreth v. *City of Longmont,* 47 Colo. 79, 105 Pac., 107;
Baltimore v. *Carol,* 128 Md. 68, 96 Atl., 1073;
Suffolk & C. Ry. Co. v. *West End Land Co.,* 137 N. C. 330, 49 S. E., 350;

In this last case, the Court said:

"Where the mere listing of the land is the act sought to be shown, the tax lists are admissible because the lister is the actor; but the rule is essentially different where the value of the land is sought to

be proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. The tax lists were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury. The tax valuation being placed on the land by the tax assessors without the intervention of the land owner, no inference that it is a correct valuation can be drawn from his failure to answer that the valuation is too low. Such valuation was *res inter alios acta* and is not competent against the plaintiff."

The rule has been followed in other proceedings.

Fort Collins Dev. Co. v. *France*, 41 Col. 512, 92 Pac., 953;

Savannah Ry. v. *Buford*, 106 Ala. 303, 17 So., 395;

St. Louis, I. M. & S. Ry. Co. v. *Magness*, 93 Ark. 46, 123 S. W., 786;

Denver & R. G. R. Co. v. *Heckman*, 45 Colo. 470, 101 Pac., 976;

Kelly v. *People's Natl. F. I. Co.*, 262 Ill., 158, 104 N. E., 188;

Martin v. *N. Y. & N. E. Ry. Co.*, 62 Conn. 331, 25 Atl., 239;

Hamilton v. *Seaboard Air Line*, 150 N. C., 193, 63 S. E., 730.

In the case last cited, the court said:

"Under our revenue law, the owner of land does not, in listing it for taxation, fix any value upon it. This is done by the assessors either from actual view or from the best information that they can practically obtain, according to its true valuation in money. We cannot see therefore, how the fact that the witness listed the land for taxation has any tendency to show

its value or his opinion in that respect. The valuation is *res inter alios acta.* The objection is not that tax lists are not public records, but in the valuation of the land for taxation, the owner is not consulted, he takes no part. The valuation is but the opinion, upon oath it is true, of these assessors for the purpose of taxation. It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation."

The lower court itself, while admitting and considering these assessments, recognizes their entire unreliability. The court says:

> "Now, while property of this nature is not assessed at full valuation for general purposes, no one will contend that it is assessed at practically only one-fifth of its actual value. Thirty or forty per cent on city property would be the lowest acceptable figure." (Trans. 131).

By what right can the court, after admitting incompetent assessments, determine without evidence—by judicial notice solely—that such assessments are not at twenty per cent, but are at thirty or forty per cent? If this is a matter for judicial notice, we do not know upon what ground it is so to be held. It may be well understood, as said, in one of the cases, that such assessments are unreliable as showing the real or market value of property; it is certainly a notorious fact, as said in another case, that the assessment of real property made by county assessors affords no criterion whatever as to its value. But if they are unreliable and afford no criterion of value, then the court has no legitimate basis for holding, without evidence, that they are thirty per cent or forty per cent and not twenty per cent of the actual value.

The court is in error in saying that no one will contend that the assessment for general taxation is only twenty per cent, just as the court is wrong in assuming that the City Assessor had anything to do with the assessments for general taxation (Trans. 131). The assessments themselves show that they were made by the County Assessor (Trans 50-51), as is the case with all real estate in the city. The City Assessor cannot for general taxes raise the assessments of the County Assessor.

Constitution of Missouri, Art. X, Sec. 11;
Rev. St. Mo. 1919, Sections 13, 150, 13, 154.

As a matter of fact, we do most strenuously contend that the assessment of unplatted, unimproved, outlying tracts in Kansas City for general taxation is as low as twenty per cent and usually even lower. We can prove by evidence, if the question becomes material, that fifteen per cent is not an unusual figure, and that in cases it is even less. The question has not yet become material, because the complainants, while alleging that the tax bills are confiscatory, have adduced no evidence whatever to sustain that allegation, but have left the court to speculate as to what the proportion of assessment may be. This speculation by the court is utterly indefensible.

Even the special assessment made in this grading proceeding by the City Assessor is no evidence of value. As said in *Martin* v. *N. Y. & N. E. Ry. Co., supra,* "the value of property by assessors is solely for the purpose of determining the amount it shall pay as taxes," and in *Hamilton* v. *Seaboard Air Line*, supra, "It is well understood that it is the custom of the Assessors to fix a uniform rather than an actual valuation." So in this case,

the valuation by the City Assessor was for the purpose of distributing the cost only, not for the purpose of justifying the improvement or determining real values.

Based upon these figures, the lower court found that the total cost of the grading equals approximately twenty-six per cent of the total assessed valuation of the district as fixed by the City Assessor. But there is no evidence that the benefit did not equal twenty-six per cent, or that twenty-six per cent is under the circumstances, confiscatory. The statement of the lower court that the tax bills unreasonably exceed any possible benefit to the benefit district is wholly without justification in the record. There is not a scintilla of evidence to support it.

V.

Even if it be established by competent evidence that the tax bills against complaintants' lands exceed the special benefits thereto, such fact would not be sufficient to invalidate the tax bills.

There was some general testimony by witnesses Ellison and Jones that complainants lands were not benefited in an amount nearly so great as the tax bills against such lands. This testimony will not warrant setting aside the bills. It has been many times held that whether and to what extent the tax bills exceed in amount the actual benefits to individual tracts, are not judicial questions.

St. Louis v. *Brewing Co.*, 96 Mo., 677, 10 S. W., 477;

Michael v. *St. Louis*, 112 Mo., 610, 20 S. W., 666;

St. Louis v. *Ranken,* 96 Mo. 497, 9 S. W., 910;
Chadwick v. *Kelley,* 187 U. S. 540, 23 S. Ct., 175;
Prior v. *Construction Co.,* 170 Mo., 439, 71 S. W., 205;
Heman Construction Co. v. *Wabash R. R.,* 206 Mo. 172, 104 S. W., 67;

VI.

The suit in the Circuit Court of Jackson County complies with the provisions of the charter and ordinances and comports with due process of law.

A.

It is alleged that the provisions of Section 28 of Article VIII of the charter were not complied with in that no suit was filed "in the name of the city against the respective owners of land chargeable under the provisions of this section with the cost of such work." Inasmuch as the tax bills are made by the charter *prima facie* evidence of the regularity and legality of the entire proceedings, there is a presumption that all necessary steps were duly taken.

Sec. 24, of Art. VIII, Charter of Kansas City;
Collins v. *Jaicks,* 279 Mo., 404, 214, S. W., 397.

The suit filed in the Circuit Court was entitled "In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo, Un-

der Ordinance No. 21831, Approved January 26, 1915." The petition begins:

> "Comes now Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and alleges....."

A later paragraph begins:

> "Kansas City further states and alleges....."

And the prayer is:

> "Kansas City also prays the court to find and determine....."

The petition is signed:

> "Kansas City, by A. F. Evans, City Counselor, Jay M. Lee, Asst. City Counselor." (Trans. 87-88).

The record entries in the case read:

> "Now comes Kansas City....." (Trans. 73-79).

The petition alleges the passage and approval of the grading ordinance and sets it out in full; the approval and adoption of plans and specifications; the making of approximate estimates of cost, of which copies were attached to the petition. It defines and sets forth the limits of the benefit district.

Service was had by publication, the order of publication being directed "To All Persons Whom It May Concern," and containing the substance of the ordinance, the filing of the suit, the limits of the benefit district prescribed by the ordinance, and a notice of the time and place of hearing. (Trans. 97-99). This was in accordance with Section 11 of Article XIII of the charter, under the terms of which Section 28 of Article VIII provides that service shall be made. (Trans. 28-29).

Gertrude P. Brown, one of the complainants in the companion suit now pending in the Circuit Court of Appeals,

8th Circuit, and some other property owners, appeared and answered in the suit. She appeared at the entry of judgment, and later filed a motion for new trial which was overruled and excepted to.

(1) The proceeding is in the name of the city.

It is first said that this proceeding is not in the name of the city. There is no merit in the contention for these reasons.

The caption is no part of the petition.

State v. *Patton*, 42 Mo., 530;
Livingston v. *Coe*, 4 Neb., 379.

The names of the parties need not be set forth in the caption—it is sufficient if they appear in the body of the petition.

State v. *Patton*, 42 Mo., 530;
Beattie v. *Lett*, 28 Mo., 596.

Even though a statute expressly requires that the parties be named in the caption, the failure of the caption to include them is a mere defect of form, and does not go to the jurisdiction of the court. A judgment rendered on the petition has full force and effect. The defect cannot be taken advantage of in a collateral proceeding.

Ammerman v. *Crosby*, 26 Ind., 451;
Smith v. *Watson*, 28 Ia., 218.

The fact that a proceeding is entitled "In the Matter of....." instead of having the usual heading naming the parties is quite immaterial so far as the cause of action is concerned.

In re Clary's Estate, 112 Cal., 292, 44 Pac. 569.

It is beyond question, therefore, that the caption itself is unimportant, and that the wording of the petition and of the journal entries shows a proceeding in the name of the city.

Kansas City v. *Mastin*, 169 Mo. 80, 68 S. W., 1037.

(2) The proceeding is against the respective land owners.

It is next said that the proceeding is not brought against the respective owners of land to be charged. This contention is likewise without merit. The charter provision does not require that the names of all owners shall be set forth in the petition. The provision, reasonably interpreted, means only that the respective owners of land in the district shall be served with process in the proceeding, and be afforded respectively a hearing therein. This is the only reasonable interpretation when we consider that in one proceeding under the Section there may be hundreds of land owners in the benefit district. In such a case it would be well-nigh impossible, and certainly futile, to recite the various names.

It must be borne in mind that the proceeding is purely *in rem*. No judgment is rendered against the owners of property. The tax bills are a lien on the land, and can be enforced against it only. Persons are interested, because their lands are affected, and therefore they should be notified of the pendency of the proceeding, but the suit is in no sense a suit against them.

From the very nature of the proceeding it cannot be a suit against the respective property owners, as complainants interpret the phrase. The charter provision is not to be given the same construction as would be proper were the proceeding *in personam*. If the suit provided for were one *in personam*, against individuals, the interpretation might be otherwise.

It is axiomatic that a petition need state those facts, and no more, which are essential to the cause of action declared on. In the absence of a charter requirement that the names of the property owners be set out in the petition filed in the Circuit Court, it seems clear that those names would not be requisite parts. No relief is asked against the property owners. No allegation could be made against them except that they own the property. There is absolutely no purpose in connecting them with the proceeding in any way except to give them due notice and an opportunity to be heard.

All possible question as to this interpretation is removed by the provisions for the order of publication. In Section 11, Article XIII, which governs service of process in the proceeding, it is expressly provided that the published notice "shall be directed to all persons whom it may concern, without naming them, notifying them of the day

and place." Beyond question, then, the order of publication need not name the individual owners. If so, there is no practical advantage or purpose in stating the names of the owners in the petition.

The purpose of naming the defendants in a suit *in rem* is to give them notice of the pendency of the action. As a matter of practice, this is accomplished by the order of publication. It would seem that if the names need to appear any place in the proceeding, they should be given in the order of publication. Where the charter expressly and unequivocally says that the order of publication need not name the property owners, there is no justification for assuming that the words "against the respective owners" requires that the names appear in the petition.

Special attention is called to that part of Section 11, Article 13, which provides as follows:

> "Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause and to make any finding or order or render any judgment therein as fully as though all the parties interested at the time of taking effect of such ordinance or at any time thereafter had been sued by their proper names and had been personally served."

If this section be read in connection with Section 28 of Article VIII, as should be done, there seems to be an express recognition that the owners need not be sued by name.

We submit that the only reasonable interpretation of the clause in question is, not that the names of the respective owners must be set forth in the petition (a useless requirement), but that the respective owners be served with process

and be afforded an individual, not a joint, hearing in the trial of the cause.

So far as the question of notice is concerned, the substantial thing is the order of publication. It is that which is published. It is that which is relied upon to give notice to the property owners of the existence of the proceeding. Where the Charter definitely says that the order of publication need not name the property owners, it is manifest how formal and technical is a requirement, if there be one, that the owners be named in the petition.

Complainants lay much emphasis upon the word "respective." It should be construed with reference to the latter part of the third paragraph of Section 28, which is as follows:

> "And the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts and parcels of land owned by each respective defendant."

When the Charter says that the City shall file a proceeding against the respective owners of lands chargeable with the cost of the work, it clearly means that the proceeding shall be filed against those owning the respective tracts in the benefit district. Here is a plain recognition that the proceeding concerns primarily the lots or tracts, and a requirement that the owners of these lots or tracts be afforded a hearing.

Certainly, there is nothing in the word "respective" inconsistent with defendants' interpretation of the provision.

"Respective" has reference only to the causes of action as to the separate or respective lots.

Even if the provision could on any theory be taken to mean that the names of the property owners should appear in the petition, non-compliance would be a defect of form merely, as we have shown, and hence cured by judgment. Moreover, such requirement has been substantially complied with. As Plaintiff's Exhibit 24 shows, there was filed along with the petition a map or plat, a copy of which is in evidence here as Plaintiff's Exhibit 12, containing the names of the respective property owners in the district. This map or plat is definitely referred to and identified in Ordinance No. 21831, a certified copy of which was filed with the petition, and made a part thereof, as Exhibit A. The plat may be considered along with the petition in this connection, and if any matter, omitted from the petition proper, is supplied by the plat, the proceeding cannot be complained of.

Goodrich v. *Detroit*, 184 U. S., 432, 22 S. Ct., 397;
Kansas City v. *Mastin*, 169 Mo., 80, 68 S. W., 1037;
Jackson v. *Waterway District*, 85 Wash., 301, 147 Pac., 1140;
Reed v. *Cedar Rapids*, 137 Ia., 107, 111 N. W., 1013.

Substantial compliance with such a Charter provision is all that is required.

Ammerman v. *Crosby*, 26 Ind., 451;
Black v. *McGonigle*, 103 Mo., 192, 165 S. W., 615.

Furthermore, service of process being had in strict accordance with the Charter, the property owners were duly in court, and defects in the pleadings, not objected to, were waived by all parties.

State ex rel. v. *Lundquist*, 103 Wash., 339, 174 Pac., 440.

The decree of March 29, 1915, approving publication, and finding that lawful service had been had, is conclusive as to all such matters. It must therefore be taken as fact that complainants and other property owners in the district were duly summoned into Court. Complainants are thereby precluded from questioning the defects in pleading now complained of.

Lingo v. *Burford*, 112 Mo., 149, 20 S. W., 459;
Nemally v. *Joest*, 74 Ind., 409.

As stated by the Supreme Court of Missouri in *Fitzgerald* v. *De Soto Special Road District*, 195 S. W., 695, 697 (Mo.):

> "Where the court had jurisdiction of the subject-matter and person of plaintiff, as in this case, and where the record affirmatively recites the facts necessary to confer jurisdiction, the judgment of said court, in respect to such a matter, is not only conclusive in a collateral proceeding like this, but would be equally so in a direct proceeding in equity, to set aside the judgment, unless it appears that fraud was practiced in the very act of obtaining judgment."

B.

If, however, the Circuit Court suit is defective, these defects are not fatal since the suit was not necessary to due process. Section 24 of Article VIII of the Charter provides in part:

> "The ordinance authorizing any public improvement and the contract therefor, and approving and confirming such contract, shall operate and shall be held by all departments and courts, to cure all errors and irregularities, if any, on the part of the City in the proceedings relating to such improvements, up to and including the time such ordinance take effect, and no tax bills shall be defeated, or the amount or lien thereon in anywise be affected, by reason of any such error or irregularity."

Perhaps this provision of the Charter could not constitutionally be given effect as to defects of substance in prior stages of the proceeding, where such prior stages are requisite to due process of law. For example, if the Circuit Court suit were necessary, in order to comply with the 14th Amendment, a failure to publish the order of publication in that proceeding (a defect which might deprive the court of jurisdiction) could not perhaps, be corrected by some later action of the City Council, though mere defects of form could always be corrected. But if, as in the present situation, the Circuit Court suit, although authorized by the Charter, might be omitted altogether, without affecting the constitutionality of the Section, a totally different consideration applies. Steps in the Circuit Court suit in such case can be changed or done away with or corrected by later proceedings of the council.

To use a simple illustration, let us suppose a charter requirement that after an ordinance to grade has been passed it shall be submitted to the city counselor for his opinion. Suppose a further charter provision that the failure to submit the ordinance to the city counselor shall not invalidate the proceeding. The latter provision would certainly be effective.

The situation under Section 28, Article VIII, is similar. A suit in the Circuit Court is provided for. Such a suit is not essential to due process of law. There is a further provision in the Charter that the ordinance confirming the contract which is passed after the Circuit Court proceeding has been completed, shall cure all errors or irregularities in the prior proceedings. The effect of such a provision is to correct and do away with and render immaterial to the validity of the tax bills all defects whatsoever in the suit.

That the Circuit Court proceedings is not required by due process of law is abundantly established. *Saxton National Bank* v. *Carswell*, 126 Mo., 436, *supra*, holds constitutional a statute identical, in substantial respects, with Section 28, with the court proceeding eliminated. This statute governs cities of the second class in Missouri, and has been in force for a great number of years. It is embodied in Section 9046-9049, Revised Statutes of Missouri, 1909.

The following cases affirm this conclusion. The hearing which the property owner is afforded in the suit on the tax bill satisfies due process of law.

Voigt v. *Detroit*, 184 U. S., 115, 22 S. Ct., 337;
Goodrich v. *Detroit*, 184 U. S., 432, 22 S. Ct., 397;
Paulsen v. *Portland*, 149 U. S., 30, 13 S. Ct., 750;
Walston v. *Nevin*, 128 U. S., 578, 9 S. Ct., 192.

Of course it is true that if the Circuit Court suit was not had substantially as prescribed by the charter, the judgment could not be *res judicata* of the issues involved, as contended under Point VII of this brief, but so far as affecting the validity of the bills is concerned, the passage of Ordinance No. 24693 renders immaterial all defects in the proceeding.

C.

The suit in the Circuit Court comports with due process of law. Service by publication in special assessment proceedings is constitutional.

> *Kansas City* v. *Duncan*, 135 Mo., 571, 37 S. W., 624;
> *Kansas City* v. *Ward*, 134 Mo., 172, 35 S. W., 600;
> *Kansas City* v. *Mastin*, 169 Mo., 80, 68 S. W., 1037;
> *Lent* v. *Tillson*, 140 U. S., 316, 11 S. Ct., 825.

An order of publication directed to all persons whom it may concern without naming them, meets the constitutional requirement.

> *Kansas City* v. *Ward*, 134 Mo., 172, 35 S. W., 600;
> *Kansas City* v. *Duncan*, 135 Mo., 571, 37 S. W., 624;
> *State* v. *Blair*, 245 Mo., 680, 151 S. W., 148.

The order was not improper because it set out the limits only of the benefit district, instead of a legal description of the lands therein. Section 28 provides that the petition shall "define and set forth the limits of the

benefit district", and Section 11 directs that the order recite the substance of the ordinance. This clearly justifies the order as published and is valid.

State ex rel. v. *Wilson,* 216 Mo., 215, 115 S. W., 549.

See also:

Doris v. *Pittsburgh Plate Glass Co.,* 163 Ind., 599, 70 N. E., 249;

Cleveland Ry. Co. v. *Porter,* 210 U. S., 177, 28 S. Ct., 647.

VII.

The suit in the Circuit Court finally determined all questions raised or involved therein, and all such questions are now res judicata.

If Section 28 of Article VIII be constitutional, as we have shown, and if cause No. 90628 was had in due compliance therewith, as we have likewise shown, then it follows that complainants cannot now raise objections open to them in that proceeding. Every issue herein is therefore disposed of by that suit, except the assessment proceedings which did not take place till later. That this would be the effect of an ordinary judgment is conceded. It is contended, however, that the decree in the Circuit Court suit has not such binding force.

It is first argued that the Circuit Court had no jurisdiction to render any judgment with any force. The argument is grounded upon a misunderstanding of the function

which, pursuant to the Charter, the court is to perform. The Circuit Court was not authorized merely to determine the validity of the ordinance, and therefore the proceeding is not similar to those involved in *Muskrat* v. *U. S.*, 219 U. S., 346; *State ex rel.* v. *Westport*, 135 Mo., 120, 36 S. W., 663, and other like cases. Such is not the nature of the proceeding. It is not a suit to obtain the opinion of the court as to the constitutionality of Ordinance No. 21831. On the contrary, the object is the fixing of the benefit district.

The Charter clearly authorizes and directs the Court to determine the limits of the district. The second, third and fourth paragraphs of Section 28, Article VIII, provide in part as follows:

> "The prayer of the petition shall be that the court find and determine the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance. * * *
>
> In such proceedings the city shall have the right to offer evidence tending to prove the validity of * * * said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of * * * said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien. * * *
>
> The court shall render judgment either validating such * * * proposed lien against the lots, tracts and parcels of land within said benefit district *or against*

such lots, tracts, or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such * * * proposed lien is, in whole or in part, invalid and illegal."

It is perfectly evident that the court is to determine the district to be assessed. The court is directed to find and determine whether or not the tracts of each defendant shall be charged with the lien of the work, and shall render judgment invalidating the proposed lien or validating it against such tracts as the court may find legally chargeable therewith.

The evidence authorized to be introduced must be evidence bearing on the question of relative benefits, introduced for the purpose of enabling the court to decide where the limits of the district should be established. And if, from the evidence before it, the court decides that the benefit which will probably accrue to a particular tract is so slight that the tract should not be assessed, that tract may be excluded from the district established.

The petition filed in the case recognizes this principle. Kansas City "prays the court to find and determine the * * * question of whether or not the respective tracts of land within said district shall be charged with the lien of said work", and the order of publication is framed on the same theory.

It is of course true that courts will not take cognizance of mere moot questions and that adjudications in such cases are perhaps binding upon no one. A court will not entertain a suit simply to declare a statute constitutional or unconstitutional. The language of Mr. Justice Brewer in *Tregea v. Modesto Irrigation District,* 164 U. S., 179, 17 S. Ct., 52,

quoted by the lower court in its opinion, was nothing more than an expression of this rule. It has no reference whatever to a suit filed by a city against the owners of property in a benefit district to determine whether the district is a proper and reasonable one with power in the court to exclude property if not benefited and to hold the district invalid if it exclude property that should have been included or is otherwise unfair.

The argument that there were no adverse litigants is wholly untrue. The suit was filed by Kansas City and was a proceeding *in rem* in which the owners of the property were duly brought into court. Several of them actually appeared and contested the litigation. Others made default. All were served and had an opportunity to contest if they desired. The judgment held the ordinance fixing the district valid and adjudged that the lands of the defendant might be charged with the lien of the tax bills. This would seem to be a proper justiciable controversy *in rem*.

Gibler **v.** ***Mattoon,*** 167 Ill., 18, 47 N. E., 319;
Morgan Creek Drainage Dist. v. *Hawley,* 255 Ill., 34, 99 N. E., 68;
People v. *Linda Vista Irrigation Dist.,* 128 Cal., 477, 61 Pac., 86;
Rialto Irrigation Dist. v. *Brandon,* 103 Cal., 384, 37 Pac., 484.

There are many cases in which the judgment of the court simply declares or establishes a status. A judgment establishing a will, a decree of divorce, a decree annulling a marriage—are of this character. The judgment in the suit

to quiet title to real estate under the Missouri statutes is analogous.

The case of *In re Union Railway Co.*, 112 N. Y., 61, 19 N. E., 664, is apposite. The statute involved provides for a proceeding to determine whether an elevated railway shall be constructed in the face of the opposition of the property owners affected. The court holds that such a question may properly be passsed upon, and that the decision amounts to a judgment *in rem*, conclusive against all mankind.

Complainants sought in the trial court to establish the proposition that the city and the contractor (through whom defendants claim) are not in privity. But no privity is required. This follows as a corollary to the fact that a proceeding *in rem* is not a suit between individuals. Provided there be proper notice, the judgment is conclusive against the whole world. The question of privity or no privity does not enter in.

Gelston v. *Hoyt*, 3 Wheaton, 246;
Meriwether v. *Block*, 31 Mo. App., 170;
People v. *Linda Vista Irrigation Dist.*, 128 Cal., 477, 61 Pac., 86;
First Nat. Bk. v. *McCaskill*, 174 N. C., 362, 93 S. E., 905;
Christianson v. *King County*, 239 U. S., 356, 36 S. Ct., 114.

Complainants could have been heard in the Circuit Court on the question of the reasonableness of the benefit

district; on the claim that their lands were not benefited; on the contention that lands abutting on the improvement were benefited in a greater degree than lands at a distance; on the allegation that the improvement is of a general rather than a local nature; on the suggestion that Swope Park should be in the district; and on any other question going to the validity or propriety of the ordinance fixing the district as it was fixed. Complainants are not entitled to another day in court on these matters but are concluded by the judgment in the Circuit Court.

St. Louis v. *United Rys.*, 263 Mo., 387, 174 S. W., 78;
Spratt v. *Early*, 199 Mo., 491, 97 S. W., 925.

Every one of the questions mentioned was set up in the answers filed, every one was necessarily involved in the issues before the court and every one was determined by the judgment rendered. If these matters are not rendered *res judicata* by that judgment, then it is difficult to find any scope for the doctrine in any case.

The question of the reasonableness of the benefit district, which as much as anything seemed to move the trial court, was definitely put out of the case by the judgment of the Circuit Court upon that very matter.

Little River Drainage District v. *Railroad*, 236 Mo., 94, 139 S. W., 330;
McGhee v. *Walsh*, 249 Mo. 266, 155 S. W., 445.

VIII.

Since the trial and judgment in this case, the Supreme Court of Missouri has decided a case involving all the questions raised in this case.

Schmelzer v. *Kansas City,* 295 Mo. 322, 243 S. W. 946.

This was a suit to enjoin proceedings under Section 28 of Article VIII, similar in all legal respects to the proceedings in controversy. Of course, the improvement was different and other property was included in the benefit district, but all the steps taken were substantially identical with those now under consideration. Every question raised in this case, was urged in that; the invalidity of the method of assessment; the unreasonableness of the benefit district; the unconstitutionality of the proceedings; the excessive amount of the assessment over the benefit; the invalidity and ineffectiveness of the suit in the Circuit Court, because not brought as provided in the charter and because merely declaratory; the lack of due process of law.

The court sustains the proceedings *in toto,* upholding the provisions of the charter and giving effect to the suit in the Circuit Court to its fullest extent as *res judicata.* So far as the Supreme Court of Missouri can establish the validity of a Missouri law and proceedings thereunder, this case has done so, as to the law and proceedings in controversy here.

That court cannot, of course, determine finally the validity or invalidity of a statute under the United States Con-

stitution, yet as to all other questions the decision of the state court is conclusive. The state court having construed Section 28 of Article VIII as requiring only the character of suit filed in the Circuit Court in this proceeding, that holding must be followed here.

Forsyth v. *Hammond,* 166 U. S. 506, 17 S. Ct., 665;
Wade v. *Travis Co.,* 174 U. S. 499, 19 S. C. 887;
Mo. etc. Co. v. *Cade,* 233 U. S. 642, 34 S. Ct., 678;
Quinette v. *Pullman Co.* (C. C. A. 8th Cir.) 229 Fed., 333; 143 C. C. A., 453.

This rule is applicable also to the construction of a local, municipal statute.

Thomas Cusack Co. v. *Chicago,* 242 U. S., 526, 37 S. Ct., 190;
St. Louis etc. R. R. Co. v. *Quinette* (C. C. A. 8th Cir.), 251 Fed., 773, 164 C. C. A., 7.

And the conclusion is inevitable that, since this suit as filed *is* the suit provided for in the charter, and the service and proceedings thereunder conform to due process of law, the question whether the judgment in the suit is *res judicata* or not becomes one of state law and is conclusively determined by the State Supreme Court.

This eliminates from this appeal every issue except: first, the constitutionality of the assessed valuation method of apportioning benefits; and second, the constitutionality of the appraisement provided for in Section 3 of Article VIII. As to these two issues, the authorities heretofore cited are

absolutely conclusive. They summarily dispose of the case and require the reversal of the judgment and the dismissal of the bill.

Respectfully submitted,

JUSTIN D. BOWERSOCK,
SAM'L J. MCCULLOCH,
FRANK P. BARKER,
G. V. HEAD,
Hunter M. Merinecker *Attorneys for Appellants.*
BOWERSOCK & FIZZELL,
MILLER, CAMACK, WINGER & REEDER,
of Counsel.